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82-701
No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

NEW CASTLE AREA TRANSIT AUTHORITY,
Petitioner,

v.

ROBERT M. KRAMER, LUTHER A. MILLER, DONALD PETTITT, HOWARD N. BARNES, DAVID R. SHAW, GERALD J. MAGGIE, ERNEST ORELLI, PHILLIPS C. REED, JAMES W. BURNS, G. MAXINE PARDICK, MARTHA E. KEITH, JAMES L. RAMSEY, CLYDE W. REED, RALPH L. JONES, PHILLIPS W. REED, JOHN P. CARSON, ROBERT C. BRUNSWICK, DAVID C. MATTHEWS, WALTER R. SLACK, WILLIAM L. HANNA, LOUIS V. PAGLIARO, and all other plaintiffs similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the tenth amendment forbids Congress from imposing, through the commerce clause, upon a mass transit municipal authority the requirement that it pay overtime compensation to its bus drivers in accordance with the Fair Labor Standards Act?

PARTIES

In addition to those parties listed in the caption of the case,[1] the parties making *Amicus Curiae* appearances in the proceedings before the United States Court of Appeals for the Third Circuit are:

(1) United States of America, Department of Labor; and

(2) American Public Transit Association.

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[1] Robert M. Kramer, et al., Plaintiffs-Appellants, v. New Castle Area Transit Authority, Defendant-Appellee.

The petitioner, New Castle Area Transit Authority, is a municipal corporate authority. It is not a subsidiary or affiliate of any other publicly owned corporation whatsoever.

28 U.S.C. § 2403(a) may be applicable to this case. Pursuant to Supreme Court Rule 28.4(b), the Solicitor General is therefore being served. No other court of the United States has certified this fact to the Attorney General.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JURISDICTIONAL STATEMENT

On April 30, 1982, the United States Court of Appeals for the Third Circiut entered judgment against New Castle Area Transit Authority, reversing the judgment of the United States District Court for the Western District of Pennsylvania. The opinion of the Court of Appeals is reported at 677 F.2d 308 (1982).

On May 25, 1982, the United States Court of Appeals for the Third Circuit denied Petitioner's petition for rehearing.

Jurisdiction to review this judgment by writ of certiorari is conferred upon this Court by 28 U.S.C. 1254:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment. . . ."

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, Clause 3:

> [The Congress shall have the Power] to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

The Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent portions of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201, et seq., and the regulations promulgated thereunder 29 C.F.R. 775.3(b) are set forth in the Appendix at pages 15a to 16a.

STATEMENT OF THE CASE

The FLSA, as originally enacted in 1938, prescribed minimum wage and overtime compensation requirements for employees engaged in commerce or in the production of goods for commerce. However, that Act excluded from its provisions employees of states or their political subdivisions.

In 1958, the defendant, New Castle Area Transit Authority (Transit Authority), was officially created as a municipal authority under Pennsylvania law, pursuant to the *Municipality Authorities Act of 1945*, 1945, May 2, P.C. 382, 53 P.S. 301, et seq.[2] and thereafter began providing mass transit as a municipal service.

In 1974, Congress amended the FLSA, extending its minimum wage and maximum hour provisions to virtually all of the employees of the states and their political subdivisions. Numerous states, individual cities, the National League of Cities, and the National Governors' Conference challenged these amendments in *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). In *National League*, the Court held with respect to the wage and hour provisions of the FLSA that, to the extent that they "operate to directly displace the State's freedom to structure *integral* operations in areas of traditional governmental functions, they are not within the authority granted by 'the Commerce Clause', Art. I., § 8, Cl. 3." *Id.* at 852. While the Court did not attempt to identify each activity within the area of traditional operations of state and local governments, *id.* at 851, n. 16, it did specifically cite as examples, fire prevention, police protection, sanitation, public health, parks and recreation, *id.* at 851, and schools and hospitals. *Id.* at 855.[3]

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[2] Authorities created under this Act are independent agencies of the Commonwealth and a part of its sovereignty. *Commonwealth* v. *Erie Metropolitan Transit Authority*, 444 Pa. 345, 281 A.2d 882 (1971).

[3] In recognizing that schools and hospitals provide "an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens," 426

On remand, the three-judge court recognized that the decision left a certain "gray area" for future resolution and expressed concern over the eventual resolution of this area. *National League of Cities* v. *Marshall*, 429 F. Supp. 703 (D.D.C. 1977). In response, on December 21, 1979, the Department of Labor issued a final interpretative ruling listing non-traditional governmental functions, 29 C.F.R. § 775.3. Included in that list were local mass transit systems.[4]

On July 17, 1980, plaintiffs instituted the present action seeking declaratory relief and damages, including back wages, liquidated damages and attorneys fees. Jurisdiction of the United States District Court for the Western District of Pennsylvania was based on 28 U.S.C. § 1337 and 29 U.S.C. § 216(b). On June 11, 1981, the District Court entered summary judgment for the defendant based on a finding that the Transit Authority was engaged in a traditional governmental function and was therefore excluded from the coverage of the FLSA under

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U.S. at 855, the Court specifically overruled *Maryland* v. *Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968), which had held constitutional the extension of the FLSA provisions to those areas.

[4] Other functions of states and their political subdivisions determined to be non-traditional by the same ruling are: (1) alcoholic beverage stores; (2) off-track betting corporations; (3) generation and distribution of electric power; (4) provision of residential and commercial telephone and telegraphic communications; (5) production and sale of organic fertilizer as a by-product of sewage processing; (6) production, cultivation, growing for harvesting of agricultural commodities for sale to consumers; and (7) the repair and maintenance of boats and marine engines for the general public. 29 C.F.R. § 775.3(b).

National League. A copy of the Order of the District Court is contained in the Appendix to this Petition.

Plaintiffs timely filed an appeal to the United States Court of Appeals for the Third Circuit. On April 30, 1982, that Court reversed the decision of the District Court, holding that providing mass transportation to the public was not traditionally a government function. A copy of the Opinion and Order of the Court of Appeals is contained in the Appendix to this Petition. (This decision is reported at 677 F.2d 308 (1982).) On May 25, 1982, the United States Court of Appeals for the Third Circuit denied the Transit Authority's Petition for Rehearing. A copy of this Order is contained in the Appendix to this Petition.

ARGUMENT

I. The Decision Of The Court Of Appeals Conflicts With Other Applicable Decisions Of This Court.

This Court has, in *National League of Cities* v. *Usury*, 426 U.S. 833, 49 L.Ed.2d 245, 96 S.Ct. 2465 (1976), (*National League*), addressed the propriety of the application of the provisions of the *Fair Labor Standards Act of 1938*, (FLSA), 29 U.S.C. §§ 201-219, to employees of the States and their political subdivisions. In *National League*, the Court addressed the issue as follows:

> One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve here, then, is whether these determinations are 'functions essential to separate and independent existence,' (Citation omitted.) so that Congress may not abro-

> gate the States' otherwise plenary authority to make them. *Id.* at 845 & 846.

The Court decided this issue by holding:

> We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3. *Id.* at 852.

Thus, *National League* clearly establishes that Congress may not, through the mere exercise of the power vested in it by the Commerce Clause, impose upon the states and their political subdivisions, the requirements that they pay their employees engaged in traditional governmental functions overtime compensation as mandated by the FLSA.

This holding was explained in *Hodel* v. *Virginia Surface Mining and Reclamation Association*, 101 S.Ct. 2352 (1981). There the Supreme Court held that congressional commerce power legislation is not invalid under the reasoning of *National League* unless three requirements are met:

(1) the challenged statute regulates the states as states;

(2) the federal regulation addresses matters that are indisputably "attributes of state sovereignty";

(3) it is apparent that the states' compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional functions. *Id.* at 2366.[5]

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[5] The Court further stated, however, that a Tenth Amendment challenge is not guaranteed to succeed even if the three requirements are met because a balancing approach may be applicable. *Id.* at 2366.

In determining whether the same FLSA amendments are unconstitutional when applied to the Transit Authority under the *Hodel* test, it clearly appears that the first requirement is satisfied, i.e., the challenged statute regulates states as states, because the holding in *National League* applies to local government units. Moreover, the Transit Authority is an independent agency of the Commonwealth of Pennsylvania and a part of its sovereignty. *Commonwealth* v. *Erie Metropolitan Transit Authority*, supra.

The second requirement, that the federal regulation addresses matters that are indisputably "attributes of state sovereignty," is also satisfied. Referring to *National League*, the Court in *Hodel* held as follows:

> The Court noted, however, that "the States stand on quite a different footing from an individual or corporation when challenging the exercise of Congress' power to regulate commerce." (Citation omitted.) It indicated that when Congress attempts to directly regulate the States as States, the Tenth Amendment requires recognition "that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." (Citations omitted.) The Court held that the *power to set the wages and work hours of state employees was "an undoubted attribute of state sovereignty."* (Emphasis added. Citations omitted.) *Id.* at 2365.

That part of the third requirement, namely, that the States' compliance with the federal law would directly

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However, the balancing approach is not applicable under the circumstances of this case.

impair their ability to structure integral operations, is also satisfied in the instant case. As was held by the Supreme Court in *Hodel*:

> . . . because it (*National League*) further found that the challenged regulations would 'displace the States' freedom to structure integral operations in areas of traditional governmental functions,' the Court concluded that Congress could not, consistently with the Tenth Amendment, 'abrogate the States' otherwise plenary authority to make [these decisions].' (Citation omitted.) *Id.* at 2365.

Thus, the only question to which this Court must address itself is the remaining portion of the third requirement, i.e., whether the employees of the Transit Authority are engaged in a traditional governmental function when performing for it their duties as bus drivers.[6] This requirement was addressed by the Court in *United Transportation Union* v. *Long Island Railroad Co.*, 455 U.S. ____, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982). In *United Transportation Union*, the Court made it clear that its "emphasis on traditional state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation." 102 S.Ct. at 1354. *United Transportation Union* went on to hold that there was no justification for a rule which would allow the States to acquire functions previously performed by the private sector (specifically, freight and commuter railroads) and thus erode federal authority in

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[6] This precise question has never been decided by this Court. *United Transportation Union* v. *Long Island Railroad*, 455 U.S. ____, 102 S.Ct. 349 (1982), upon which the Court of Appeals relied, addressed a similar but distinguishable (as discussed, *infra*) issue involving state operation of a railroad.

areas traditionally subject to federal statutory regulation.

Although the Court of Appeals recognized in its Opinion that *United Transportation Union* required more than a "static historical view," it nevertheless found that local mass public transportation was not a traditional governmental function based on what it termed "historical reality." This "historical reality" consisted primarily of the fact that state involvement has sharply increased since the *Urban Mass Transportation Act of 1964*, Pub. L. No. 88-365, 78 Stat. 302, 49 U.S.C. §§ 1601, et seq., (UMTA) made available federal assistance to State and local governments in financing mass transportation systems.

Petitioner submits that this "historical reality" analysis, while purporting to comply with *National League*, *Hodel*, and *United Transportation Union*, actually is in direct conflict with those decisions. The extent of this conflict may best be recognized by applying the same "historical reality" analysis to other areas which the Court has already enumerated as traditional functions.[7]

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[7] Not only are such considerations an inadequate measure of federal interest in this area, they are also totally without merit when viewed against the actual factual circumstances in the present case. The Transit Authority was established in 1958, well before UMTA. It thus became part of an expanding group of local public mass transit services. By 1960, 66.2 percent of residents of urban areas with a population of 500,000 or more were provided with local public mass transit; 48.1 percent of residents in urban areas with a population over 250,000 had such services. By fiscal 1964, the year before funds became available under UMTA, these figures had increased to 73.3 percent and 57.1 percent, respectively. (Population statistics are from U.S. Department of Commerce, *Statistical Abstract of the United States*, Table 9 at 10-12 and Table 10 at 13 [66th ed. 1945-46],

For example, federal funding of advanced waste treatment facilities began in 1956. The Senate Report on the *Clean Water Restoration Act of 1966*, Pub. L. No. 89-753, 80 Stat. 1246 (repealed 1970), refers to "the long period of disregard and neglect that preceeded Federal legislation in this field." S.Rep.No. 1367, 89th Cong., 2d Sess. reprinted in 1966 U.S. Code Cong. & Ad. News 3969, 3975. Similarly, solid waste management (sanitation), an activity specifically exempted in *National League*, was essentially the result of federal funding. According to *State Activities in Solid Waste Management*, 1974 (EPA, Office of Solid Waste Management Programs 1975), "[m]ost of the State programs in solid waste management originated only within the past decade, under the stimuli of Federal planning grants and technical assistance authorized by the *Solid Waste Disposal Act of 1965*." In another area, comprehensive, statewide health planning has been recognized as "spotty and fragmented" prior to federal funding of such planning. See H.R. Rep. No. 2271, 89th Cong. 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad. News 3830, 3833 (Comprehensive Health Planning and Public Health Services Amendments of 1966, Pub. L. No. 89-789, 80 Stat. 1180 (1966).) *The*

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and from U.S. Department of Commerce, *Statistical Abstract of the United States*, Table 10 at 15 and Table 14 at 19-20 [86th ed. 1965] [published annually; hereafter cited as SAUS (19__)]. Cities served by public transit are from American Public Works Association. *History of Public Works in the United States, 1776-1976*, 177 (1976), J. Moody, *Moody's Transportation Manual*, a 70 (1960), J. Moody, *Moody's Transportation Manual*, a 72 (1961), J. Moody, *Moody's Transportation Manual*, a 78 (1962), and J. Moody, *Moody's Transportation Manual*, a 60 - a 61, (1964). Percentages for a given year are derived by adding the populations of the cities serviced by publicly owned transit systems, then dividing that sum by the total United States urbanized population of cities of the indicated size.)

National Health Planning and Resources Development Act of 1974, 42 U.S.C. §§ 300k *et seq.*, (1976), solidified federal dominance in the local and statewide health planning field. Finally, in the *Education for All Handicapped Children Act of 1975*, Pub. L. No. 94-142-89 Stat. 773, 775, Congress stated that "State and local education agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special education needs of handicapped children." The federal role is to be a "catalyst to local and state program growth." S.Rep. No. 94-168, 94th Cong. 1st Sess. reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1429.

Nor is it particularly significant that, as the Court of Appeals noted, mass transit was formerly controlled by the private sector. In *Brush* v. *Commissioner of Internal Revenue*, 300 U.S. 352 (1937), the Court noted:

> We conclude that the acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental functions . . .
>
> We find nothing that detracts from this view in the fact that in former times the business of furnishing water to urban communities, including New York, in fact was left largely, or even entirely, to private enterprise. The tendency for many years has been in the opposite direction, until now in nearly all the larger cities of the country the duty has been assumed by the municipal authorities. Governmental functions are not to be regarded as non-existent because they are held in abeyance, or because they lie dormant, for a time. If they be by their nature gov-

ernmental, they are nonetheless so because the use of them has had a recent beginning. (*Id.* at 370-71).[8]

Moreover, the fact that some private mass transit continues to exist is also not determinative of the issue. If the figures accepted by the Court of Appeals are used,[9] between 45 and 52 percent of all transit operations are privately owned. In 1979, 49 percent of all systems were privately owned.[10] At the same time, private schools accounted for 20 percent of elementary schools, 19.3 percent of secondary schools, and 56.5 percent of post-secondary schools.[11] Also in 1979, 58.3 percent of hospitals and 15.6 percent of beds were under state and local government ownership; and 5.2 percent of hospitals and 8.5 percent of beds were federally owned.[12]

It is apparent from the above comparisons that the factors relied upon by the Court of Appeals in arriving at its "historical reality" are not those upon which the Court

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[8] Although the decision on the narrow issue ruled upon in *Brush* (federal taxation of a local government official's salary) has since become invalid, the language in the above quotation remains as true as it was when written.

[9] These figures are misleading since they count each of the nation's 686 system as one unit, regardless of the system's size. Thus a system with one bus is equivalent to a system with over 2,000 buses. The principal provider of transit services in at least 100 of the largest 106 urbanized areas is publicly owned. U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* (Aug. 1981). The percentages accepted by the Court of Appeals therefore tend to undervalue the actual effect of publicly owned transit systems.

[10] American Public Transit Association, *Transit Fact Book*, (1981).

[11] SAUS, Table 214 at 132 (1981).

[12] SAUS, Table 175 at 110 (1981).

has relied in deciding upon traditional governmental functions in *National League* and *Hodel*. Petitioner submits that this results from the misinterpretation of *United Transportation Union* by the Court of Appeals. Although the Court in *United Transportation Union* did examine the prior history of the railroads in an effort to determine the traditionalism of state involvement, that case involved an additional circumstance not found in the present case. Specifically, the Court in *United Transportation Union* examined the prior history of federal regulation of the railroads. That history, extending back for nearly a century, and consisting of federal regulation of nearly every conceivable facet of railroad operation clearly evidenced federal control of the area, well before the intervention of the States. In such a situation, the Court held, it would be inappropriate to allow the States to subsequently enter the field and disrupt that regulation.

However, in the area of localized mass transit, there is no corresponding history of regulation. The only legislation concerning this area to which the plaintiffs can point is UMTA, which exists not as a regulatory provision, but rather as a vehicle for distribution of funds to the States.[13] Had Congress intended to attach conditions to the distribution of these funds, it could have done so through the exercise of its spending power. In the absence of such

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[13] The fallacy of the Court of Appeals' position is made clear by *Jackson Transit Authority* v. *Local Division 1285 Amalgamated Transit Union*, 50 U.S.L.W. 4603 (June 7, 1982), where this Court specifically recognized that Section 13(c) of UMTA was not intended to create any federal law governing labor relations between state and local governments and their transit employees. Further, the Court went on to recognize the difference between provisions of UMTA and those of federal statutes applicable to railroad employees.

provisions, however, even those states and local governments which became involved in mass transit after the enactment of UMTA were not acquiring such systems knowing that they were subject to a long-standing and comprehensive scheme of regulation or with an awareness that public mass transit would be subject to the FLSA. See *United Transportation Union*, 102 S.Ct. at 1356. Indeed, until 1974 all operators, drivers and conductors of street electric railways and trolley and motorbus carriers were exempted from the overtime compensation provision of the FLSA, whether they were employed by public or private employers.[14]

Thus, unlike the situation in *United Transportation Union*, the present case does not involve states entering an otherwise private enterprise and then attempting to avoid pre-existing federal statutory regulation. Rather, the present case involves a formerly private enterprise which has gradually come to be recognized as an appropriate governmental function.[15] Only after the states had

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[14] Compare Pub.L. No. 89-601, § 206, 80 Stat. 830, 836 (1966) with Pub.L. No. 93-259, § 21(b), 88 Stat. 55, 68 (1974).

[15] This recognition is evident from the legislative histories of federal urban mass transit legislation, *Metropolitan Mass Transportation Legislation: Hearings Before Subcomm. No. 1 of the House Committee on Banking and Currency*, 86 Cong. 2d Sess. 14, 26 (1960). ("it is as necessary to provide transportation for these new communities as it is to provide other public necessities such as water, sewers, police and fire protection, and so forth" [statement of Rep. Addonizio]. . ." it is a vital public necessity that such service be provided, as necessary to economic life of the community as the provision of water, police and fire protection and other recognized public necessities" [statement of Rep. Corbett]; 120 Cong. Rec. 1042 (1974) ("mass transit is as much an essential public service as the fire department or hospitals" [statement of Sen. Biden]).

properly acknowledged their responsibility and begun to provide such service did the federal government attempt to impose any regulatory authority by requiring compliance with the FLSA provisions. The Petitioner respectfully submits that when viewed in this light, the "historical reality" of the present case is clearly distinguishable from *United Transportation Union* and that the decision of the Court of Appeals therefore is in conflict with *National League* and *Hodel*.

II. The Issue Involved Herein Is Of Nation-wide Importance And Of Far-reaching Effect, And Is Therefore Deserving Of Review By This Court.

The importance of this conflict and of the issue presented is evident from the magnitude of the matter involved, its effect on the public as a whole, and the controversy surrounding the issue as demonstrated by pending litigation throughout the country.

Perhaps the best measure of the magnitude of the issue involved is an examination of the operational statistics of public mass transit. As discussed above, even under the undervalued statistics accepted by the Court of Appeals, between 48 and 55 percent of all transit operations were publicly owned as of 1978. These publicly owned systems received 90 percent of the revenues from all transit operations; accounted for 91 percent of total vehicle miles operated and 91 percent of all linked passenger trips; and owned or leased 87 percent of total transit vehicles.[16] Clearly, any final decision which results in higher operating costs to public mass transit and which subsequently

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[16] Affidavit of Herbert J. Scheuer, Executive Director-Administration of American Public Transit Association, part of the record below.

results in a detriment to either its patrons (through increased costs and/or decreased service) or the public at large (through a required increase in government funding) will affect a large sector of our society).

Moreover, the importance of this issue is further demonstrated by the number of actions pending in various jurisdictions concerning identical situations. Decisions in such cases include: *San Antonio Metropolitan Transit Authority* v. *Donovan*, Civil Action No. SA 79 CA 457 (W.D. Texas 1981), vacated and remanded for further consideration in light of *United Transportation Union*, Docket Nos. 81-1728 and 81-1735 (U.S. June 7, 1982); *Dove* v. *Chattanooga Regional Transportation Authority*, Civil Action No. 1-80-249 (E.D. Tenn. 1981), appeal docketed, No. 81-5636 (6th Cir. Sept. 2, 1981); *Alewine* v. *City Council of Augusta, Georgia*, 505 F. Supp. 880 (S.D. Ga. 1981), appeal docketed, No. 81-7490 (11th Cir. June 5, 1981); *Francis* v. *City of Tallahassee*, No. 79-446 (2nd Cir. Fla. 1980); and *Joiner* v. *City of Macon*, Civil Act. No. 79-287 MAC (M.D. Ga. 1981), appeal docketed, No. 81-7789 (11th Cir. June 14, 1981). With the exception of *Joiner* v. *City of Macon*, each of these lower courts has held that provisions of the FLSA may not be constitutionally applied to public mass transit employees.[17]

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[17] The authority also notes that this issue has recently been addressed in *Scholz* v. *City of La Crosse*, No. 80-C-238 (W. D. Wisc. Sept. 1, 1982). The court in Scholz, while finding that local public transit is not a traditional governmental function, relied upon the findings and analysis of the Court of Appeals in the present case, which, has the Authority submitts above, was decided incorrectly.

III. The Decision Of The Court Of Appeals Conflicts With The Position Taken By The United States Court Of Appeals For The First Circuit.

On June 8, 1982, the United States Court of Appeals for the First Circuit decided *Molina-Estrada* v. *Puerto Rico Highway Authority*, ____ F.2d ____, 25 W. H. Cases 685 (No. 81-1447). In that case, the Court held that the fact that "the Authority arranges for the building of roads, sometimes builds roads itself, operates toll roads, keeps its roads in repair, and . . . operates some parking lots and *plans to build a mass transit system* . . . is sufficient to indicate that the Authority is responsible for 'traditional' or 'integral governmental activities'." *Id.* at 688. (Emphasis added.)

Moreover, the Court accepted the classification of "city transit" as a traditional governmental function indistinguishable for such purposes from the foregoing activities of the Authority. However, the First Circuit, unlike the Third Circuit, found little difficulty in distinguishing its present activities, as well as those planned, which included the construction of a mass transit system, and the several specific traditional governmental activities mentioned in *National League*, as well as "city transit," from the railroad operations in *United Transportation Union*. *Id.* at 688.

CONCLUSION

Transit Authority respectfully submits that the present case is appropriate for review by this Honorable Court because the decision of the United States Court of Appeals for the Third Circuit has decided an important question of federal law which has not been, but should be settled by this Court, and, in addition, has decided that question in a way that conflicts with applicable decisions

of this Court and with a decision of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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